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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 711

UNITED STATES OF AMERICA,

Appellee,

vs.

~~ISIDORE PRESS, alias JOHN GRADY~~; T. C. FRY, JR., alias MATTHEW GRADY; ~~BUY RITE BUYERS CLUB, INC.; FACTORY SUPPLY CO., INC., STANDARD DISTRIBUTORS, INC., and AMERICAN WHOLESALERS, INC.~~,

Appellants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, T. C. Fry, Jr., respectfully requests that a Writ of Certiorari issue to review: the decision and mandate of the majority of the United States Circuit Court of Appeals for the Second Circuit entered August 11, 1964, and the denial of the petition for rehearing docketed October 21, 1964.

A. Opinions Below

The opinions of the majority and of the dissenting Judge of the United States Circuit Court of Appeals for the Second Circuit have not been officially reported but are printed in the appendix herein (Appendix A, pp. 11-43).

B. Jurisdiction

The jurisdiction of this Court is invoked under U. S. Code, Title 28, Section 1254, and Rule 19 of the Revised Rules of the Supreme Court of the United States:

(1) The majority of said Court of Appeals denied to the petitioner the constitutional guarantees of due process under the Fifth Amendment and of fair trial by jury; failed to grant the petitioner a new trial, contrary to the decisions of this Court and other Courts of Appeal.

(2) The majority of said Court of Appeals denied to petitioner the constitutional guarantees of the Sixth Amendment and Title 18, Federal Rules of Criminal Procedure, Rule 44 of the right to counsel in his defense at every stage of the proceedings.

(3) The majority of said Court of Appeals has decided an important question of federal procedure in direct conflict with applicable decisions of this Court.

(4) The majority of said Court of Appeals decided an important question establishing a new rule of evidence, creating a serious conflict among the Circuit Courts for the Second, Sixth, Seventh, Eighth Districts, which should be authoritatively settled by this Court.

C. Summary Statement

Petitioner was convicted of violating Title 18, United States Code, Sec. 371 and Sec. 1341, after a jury trial in the United States District Court for the District of Vermont. Petitioner was sentenced to five (5) years' imprisonment and five (5) years' probation.

D. Constitutional Provisions Involved

United States Constitution Amendments V and VI printed as Appendix C.

E. Statutes Involved

United States Code, Title 18, Sections 371 and 1341 printed as Appendix D.

United States Code Annotated, Title 18, Federal Rules of Criminal Procedure, Rule 44, Assignment of Counsel.

F. Questions Presented for Review

This case presents important and substantial questions of Federal constitutional and Federal procedural law:

1. Whether in a criminal prosecution, the Constitution assures an accused of effective representation regardless of whether counsel is Court appointed, or counsel of defendant's own choosing.

2. Whether in the course of representing more than one defendant and a conflict of interest arises, does the mere existence of such conflict vitiate the proceedings, even though no actual harm results; is the appropriate criterion the harm which may result, rather than the harm which did result.

3. Whether petitioner was denied the effective aid of counsel to assist him as guaranteed by the Sixth Amendment.

4. Whether the trial judge did everything necessary to safeguard petitioner's constitutional right to a fair trial, by conducting a thorough inquiry and investigating as long and as thoroughly as the circumstances of the case required, and allowing petitioner to suffer no disadvantage from the absence of counsel at a vital stage of the proceedings.

5. Whether the absence of counsel during an *ex parte* proceeding resulted in actual prejudice to petitioner, placing him under a disadvantage in violation of his right to trial by due process of law.

6. Whether the actions of the prosecutor in appealing to local prejudices, engendering into the trial an atmosphere of bias and hostility so influenced the minds of the jury that they were unable to appraise the evidence dispassionately and objectively, thus depriving petitioner of a fair trial.

7. Whether petitioner's rights were substantially impaired by the Trial Court's admission of incompetent and prejudicial evidence, which took the form of communications from third persons characterized as complaints against petitioner, even though they had never been brought to his attention.

8. Whether this Court should authoritatively settle the conflict in Federal procedure among the Circuit Courts of Appeal caused by the extension of the exception to the hearsay rule; in effect the Court below approving the doctrine: not only is evidence admissible of alleged complaints made to third persons when they are brought to the attention of defendants, but they are admissible even when not brought to the attention of defendants—that complainers were defrauded, being of no consequence.

G. Statement of the Case and Reasons for Granting Writ of Certiorari

Appellants were engaged in mail order merchandising, having a previous mail order background in employment with Sears Roebuck. For a yearly membership fee, solicited through magazine advertisements and direct mailings, appellants undertook to supply members with purchasing benefits including catalogs from which merchandise might be purchased at prices below retail. Principal headquarters for the corporations was located in Lodi, New Jersey where 12,000 square feet was rented. A warehouse was maintained for merchandise distribution in Paterson, New Jersey where 18,000 square feet was rented. A corporation known as "Buy Rite" was organized and incorporated in Bennington, Vermont in 1960 in order to avail itself of the absence of Fair Trade Laws in the State of Vermont. There were over 50,000 members. The activities in Vermont were generally limited to processing mail in a business venture which recorded sales and shipments in excess of $5,000,000.00 within a single year.

Appellants were charged with fraudulently devising a scheme to induce persons to become members of a merchandise buying club by misrepresenting to them the terms of membership; failing or delaying the shipment of merchandise; failing to make refunds or to promptly answer correspondence.

Upon his arraignment July 24, 1962, petitioner Fry was furnished with the same counsel who represented the co-defendants and the corporations. Fry had severed his connection with the co-defendants prior to the time when the indictment was returned. His relationship toward the co-defendants when he severed his relationship was antagonistic.

On December 17, 1962, petitioner's attorney moved *ex parte* to withdraw as counsel [Appendix F, p. 54], alleging as the reason therefor, that he was "of the opinion that some of the defendants, because of their positions towards

the charges and towards each other, should have separate counsel". Patently, in a period of five months in representing petitioner, statements must have been made to his attorney, confidences furnished, witnesses examined and a defense prepared. Since petitioner was not present upon the hearing of the *ex parte* motion, the trial judge was under a duty to make a thorough inquiry to ascertain whether any confidences were made by Fry to counsel, whether he had any documents in his keeping. It was incumbent upon the trial judge, to take all steps necessary in order to insure the fullest protection of petitioner's constitutional rights. *Snell* v. *U. S.*, 174 Fed. (2nd) 580; *Johnson* v. *Zerbst*, 304 U. S. 458. The fact that counsel asked to be relieved did not automatically end the responsibility of the trial judge, for he is the key figure in any proceeding wherein a person's life, liberty or property is affected. *Hawk* v. *Olson*, 326 U. S. 271. He should have held an inquiry on notice to the petitioner, at which time petitioner could have been present. The trial judge should have inquired into the facts concerning petitioner's connection with the defendant corporations, whether such association had been terminated before the indictment had been returned; whether withdrawing counsel had in his keeping documents or statements of witnesses and other papers belonging to petitioner. Retiring counsel should have been questioned by the trial judge as to whether his continued representation of the co-defendant Press and the corporation would involve any irreconcilable differences with petitioner, whether his continuance in the case as Press' counsel would have provided the co-defendants with an unconscionable advantage to petitioner's detriment. Petitioner's presence at the *ex parte* hearing was necessary in order for the proceedings to have been adequate and effective, since there were substantial issues of fact as to events in which petitioner participated. The Constitution assures an accused in a criminal case of effective representation. This is so whether counsel is court appointed or counsel of his own choosing. *Craig* v. *U. S.*, 298 F. (2nd) 461.

Petitioner, not represented by counsel at this *ex parte* hearing, suffered great disadvantage. This was a violation of due process. *Townsend* v. *Burke,* 68 S. Ct. 1252.

The rule prohibiting an attorney from representing conflicting interests, precludes such an attorney from putting himself in a position where he might be required to choose between conflicting duties or attempt to reconcile conflicting interests. It should also preclude him from enforcing the rights of one of such parties with conflicting interests and from taking advantage of confidences entrusted to him by former clients. *Weaver* v. *U. S.,* 263 F. (2) 577. When a conflict of interest arises, the mere existence of such a conflict vitiates the proceedings, even though no actual harm results. The potentiality that such harm may result, rather than that harm did result, furnishes the criterion. *Commonwealth* v. *Russell,* 406 Pa. 45. The right is too fundamental and absolute to permit courts to indulge in nice calculations. *Glasser* v. *United States,* 315 U. S. 60. At the trial Press testified, Fry faced with cross examination by his former counsel did not testify. Petitioner's rights under the Fifth and Sixth Amendments were violated. *Porter* v. *U. S.,* 298 F. (2) 461.

The dissenting opinion in the Court below points out that the prosecution presented a mass of evidence purporting to be over 4000 so-called "complaints" in an attempt to show that there was knowledge that the representations were false when made, or that there was a reckless disregard for their truth. The word "complaints" was universally applied by the prosecutor although it was unjustifiably applied. Appellee attempted to create the impression in the jurors' minds that there were thousands of club members who had encountered difficulties. An "overzealous" postal inspector was permitted to refer to letters, which had never been brought to petitioner's attention, as "3200 complaints". Officers of the Chamber of Commerce were permitted to state that they had received hundreds of "complaints" although no copies of these were submitted to petitioner. These conclusions were not incidental state-

ments, they were the strong accusations of a major Government witness. The letters were not admissible and their contents should not have been characterized as "complaints". *U. S.* v. *Levy,* 138 F. (2) 429; *Goldstein* v. *U. S.,* 63 F. (2) 609. The admission of such testimony was extremely prejudicial for it deprived petitioner of the right to be confronted with witnesses against him as well as the opportunity for cross examination as guaranteed under the Sixth Amendment. There was no way of ascertaining whether the writers of these letters were seeking the status of an order, making a routine inquiry or whether they actually had bona fide complaints. There was no evidence that anyone was misled, nor was there a scintilla of proof that anyone had been defrauded. Notwithstanding, the majority of the Court below departed from well-settled principles of law. They created a new legal principle, i.e., that in a fraud case, evidence of the extent of dissatisfaction of third persons, not proved to have been defrauded, nevertheless is admissible. No one would urge that the existence of a dissatisfied customer whose complaint was not based on fraud, has any logical bearing on whether a defendant had been guilty of fraud in another case. Yet the rule established by the majority admits as proof of fraud, evidence of dissatisfaction without any proof that the dissatisfied customer was defrauded. Certainly this is a *non sequitur* and shifts the burden of proof to a defendant. It creates a serious conflict among the Circuit Courts of the Sixth, Seventh and Eighth Circuits. *Harrison* v. *United States,* 200 Fed. 662 (6th Cir. 1912); *Hair* v. *United States,* 240 Fed. 333 (7th Cir. 1917) and *Dr. J. H. McLean* v. *United States,* 253 Fed. 694 (8th Cir. 1918). The errors in the admission of evidence of complaints and of dissatisfaction may well have been the deciding factor preventing the jury from passing fairly on petitioner's factual position and bringing about an unjust conviction.

To these serious errors which deprived petitioners of a fair trial must also be added the prejudicial and inflammatory statements of Government's counsel generat-

ing an atmosphere of bias and prejudice against the non-resident petitioners. Government's counsel offered a large open box purporting to contain 750 letters of "complaint" sent to the Bennington Chamber of Commerce. After exhibiting this open box in the plain view of the jury for a period of almost the length of the trial, the Government offered to withdraw it. This did not cure the damage. It does not meet the test established by this Court in the *Jencks* case, 77 S. Ct. 1007, nor does it meet the criterion established by Judge Black in the *Viereck* case, 318 U. S. 236, at page 248. The prosecutor must draw a careful line. He should be fair, and should not seek to arouse passion or engender prejudice. This conduct on the part of Government's counsel in assuming prejudicial facts not in evidence was not confined to a single instance, it was pronounced and persistent. The cumulative effect cannot be overestimated and undoubtedly deprived petitioner of a fair trial [see Appendix E, pp. 47-53] since it was a vital issue. *Berger* v. *United States,* 295 U. S. 78. The prosecuting attorney is the representative, not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, whose interest in a criminal case is that justice shall be done. Despite this he insinuated that satisfied customers were not called by petitioners because their testimony would be damaging. This was extremely prejudicial. Testimony from such witnesses would have had to be excluded. *Johnson* v. *U. S.,* 215 F. 679; *Smith* v. *U. S.,* 312 F. (2) 867.

Vermont natives are not especially noted for their warmth of feeling towards outsiders. The prosecutor capitalized upon this knowledge, guided perhaps by Ovid's principle of *exitus acta probat.* He persistently appealed to the jurors' parochialism and biased them against petitioners *ab initio.* By a sort of chit-chat, in the nature of small talk, the prosecutor drew a distorted picture of freebooters insinuating themselves into the life of the community, seeking to cloak their operations in "Vermont honesty". Vermont has no law proscribing sales at less

than Fair Trade prices, yet the prosecutor imputes dishonesty and criminality to petitioners because they sold merchandise at prices lower than those fixed by the manufacturers. Clearly, this was a device to unfairly influence the minds of the jurors, thus depriving petitioners of an impartial jury in the District wherein the crime is alleged to have been committed. [See Appendix E, pp. 47-53.] While the majority opinion recognizes that many errors were committed during the trial, it regards them as minor aberrations and thus harmless. This conclusion is incompatible with the number and type of errors. When the combination of factors is weighed, the total sum grievously affected substantial rights of the petitioner. A sufficient basis was established for the assertion that petitioner's constitutional rights were violated.

H. Conclusion

Great violence has been done to the constitutional rights of petitioner Fry. The Writ of Certiorari should be granted for the following reasons:

1. Petitioner was deprived of the aid of counsel at a critical stage of the proceedings.

2. The atmosphere of the trial was charged with bias and hostility engendered by the prosecuting attorney.

3. The Court below disregarded settled principles of law and created new ones unique in legal lore.

4. An important question is involved on rulings of admission of evidence concerning which three Courts of Appeal have previously reached a contrary result.

Respectfully submitted,

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On the Brief.

APPENDIX A—Majority and Minority Opinions of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 306—September Term, 1963.

(Argued March 4, 1964 Decided August 11, 1964.)

Docket No. 28621

UNITED STATES OF AMERICA,

Appellee,

—v.—

ISIDORE PRESS, alias John Grady, T. C. FRY, JR., alias Matthew Grady, BUY RITE BUYERS CLUB, INC., FACTORY SUPPLY CO., INC., STANDARD DISTRIBUTORS, INC., and AMERICAN WHOLESALERS, INC.,

Defendants-Appellants.

Before:

MOORE and FRIENDLY, *Circuit Judges,*
and DIMOCK, *District Judge.**

Appeal from the United States District Court for the District of Vermont, Ernest Gibson, *Judge,* by two individual defendants from convictions under 18 U. S. C. A. §§1341 and 371 and by four corporate defendants from convictions under 18 U. S. C. A. §371.

Affirmed.

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* Sitting by designation.

Appendix A.

JOSEPH F. RADIGAN, United States Attorney for the District of Vermont (John H. Carnahan, Assistant United States Attorney, Michael P. Epstein, Attorney, Department of Justice, of counsel), *for the United State of America.*

MAX FEIGIN, New York, New York and RYAN, SMITH AND CARBINE, Rutland, Vermont, *for Isidore Press and Buy Rite Buyers Club, Inc., Factory Supply Co., Inc., Standard Distributors, Inc., American Wholesalers, Inc.*

BERNARD BURLAKOFF, Westbury, New York, *for T. C. Fry, Jr.*

MOORE, *Circuit Judge*:

Isidore Press, T. C. Fry, Jr., Buy-Rite Buyers Club, Inc., Factory Supply Co., Inc., Standard Distributors, Inc. and American Wholesalers, Inc. appeal from judgments of conviction entered upon a jury verdict in the District Court for the District of Vermont. The individual appellants were found guilty of 24 counts under the Federal Mail Fraud Statute, 18 U. S. C. A. §1341, and of one count of conspiracy, 18 U. S. C. A. §371. The corporations were convicted on the conspiracy count. The indictment named, in addition to appellants, Lawrence Press, Selmajane Stuchell and William Stuchell. Defendant Lawrence Press was acquitted of the conspiracy charge and has not appealed from his conviction on the mail fraud counts. Selmajane and William Stuchell were acquitted on all counts.

Appendix A.

Count 1 of the indictment charged that the individual defendants, while managing and operating the corporate defendants (October 1960 to the date of indictment, June 27, 1962), unlawfully devised a scheme and artifice to defraud by "obtaining money . . . from the class of persons to be defrauded by means of false, fraudulent and misleading pretenses, representations, and promises made by Buy-Rite Buyers Club, Inc., and the [individual] defendants, the defendants well knowing at the time that the pretenses, representations, and promises were false, fraudulent, and misleading when they were made." Count 1 cited with great particularity magazine advertisements, promotion literature and numerous other aspects of the alleged scheme which were repeated by reference in counts 2 through 77. Counts 1 through 77 charged the receipt of specific pieces of mail and telephone calls all in furtherance of a scheme to defraud in violation of 18 U. S. C. A. §§1341, 1342, or 1343. Count 78, which included the corporate defendants, was for conspiracy, and alleged as overt acts the specific transactions enumerated in counts 1 through 77. Fifty-three of the 78 counts, including those charging a violation of 18 U. S. C. A. §§1342 and 1343, were dropped by the Government; thus, there remained 24 substantive counts and one conspiracy count for the jury.

It is undisputed that appellants Press and Fry were the central figures in the appellant corporations. They were engaged in mail-order merchandising. For a yearly membership fee, solicited through volume mailings and magazine advertisements, appellants undertook to supply members with various purchasing benefits including catalogs from which merchandise might be selected at costs substantially below retail. Headquarters for these enterprises was in Lodi, New Jersey, and the warehouse was located in nearby Paterson. While the Government's case necessarily covered the overall operation of the appellant cor-

porations, it centers on the facts surrounding the business of Buy-Rite Buyers Club, Inc.

Appellants organized Buy-Rite, a Vermont corporation, in Bennington, Vermont in the latter months of 1960, ostensibly to take advantage of the absence of Fair Trade laws in Vermont. They leased a small office, took a post office box, hired three or four people (including the Stuchells) for clerical help and opened a bank account. Activities in Vermont were generally limited, however, to processing mail and forwarding it to New Jersey. Beginning in March and continuing until December of 1961, Buy-Rite conducted a campaign of magazine advertisements and bulk mailings of solicitation literature. During that period a total of 3,600,000 pieces of the basic promotion matter was mailed. All mailing was done in the New York City area, but the return addresses and letterheads gave the Bennington office.

The solicitation literature must be reviewed in some detail. It consisted of four items: a four page covering letter, a yellow "Factory Price List," a four page blue flyer and a two page combination membership application form and club member order blank. Each of the four items was an artfully drawn document trumpeting in flamboyant terms the merits of Buy-Rite membership. In the unlikely event that recipients had pored meticulously and critically through these enticing circulars they might well have been perplexed as to exactly what Buy-Rite would deliver for the seven dollar yearly fee.

The four page covering letter, signed by appellant Fry as "Matthew Grady, Membership Director," explained that "buying right" with Buy-Rite enabled one to select from a vast assortment of commodities at prices "25% BELOW wholesale resale quotations to retail dealers! As "solid evidence" of the merits of Buy-Rite, the letter urged recipients to take advantage of the order blank and "Factory

Price List"; Buy-Rite's references, which were said to include Dun & Bradstreet, "are the best," the letter continued, and they would affirm that Buy-Rite was a "bona fide organization" which dealt "reliably, promptly and honestly." The seven dollar yearly membership fee would provide five basic services:

> "1. You can buy directly from us all the merchandise we offer STRICTLY at Factory or Importers' quotations to wholesalers.
>
> 2. As a BUYERS CLUB we publish a comprehensive BLUE BOOK BUYERS GUIDE . . . [which] directs you to other merchandise sources . . . AT THE LOWEST PRICES OUR RESEARCHERS HAVE TURNED UP. . . .
>
> 3. We cause to be sent to you by other firms or enable you to secure from other firms a whole host of catalogs . . . price lists. . . .
>
> 4. We operate a consultation and quotation service for ONE FULL YEAR for our club members.
>
> 5. We function as a unique introduction service and as such, offer this. Upon joining our club we'll send you $14 in CREDIT CERTIFICATES. These are good with other firms. . . . THESE CERTIFICATES ARE JUST AS GOOD AS CASH!"

"YOU WON'T LOSE A CENT WITH US IN ANY EVENT!" continued the letter, and "if you aren't FULLY SATISFIED . . . IF YOU ARE NOT WITHIN THIRTY FULL DAYS CONVINCED THAT ITS VALUE IS MUCH MUCH GREATER THAN A $7.00 membership fee, then just return everything to us. We don't ask questions. We'll promptly refund your membership fee FULLY."

Appendix A.

The factory price list contained about 600 products, many bearing well-known nationally advertised trade names. Retail, wholsesale and "factory" prices were listed, but the products were available to Buy-Rite members at "factory" prices. Prospects were assured that "most orders are shipped complete from our own warehouse within 24 hours after receipt." The four-page blue brochure in the Buy-Rite material further developed the benefits set forth in Matthew Grady's covering letter. "A huge catalog" of over 700 pages was described as one of the many features included in the membership fee, and the prospect was asked: "How much more do you feel such a catalog is worth when you can buy substantially all its contents at factory or importers' prices?" The brochure also discussed the "Buy-Rite Blue Book Buyers Guide," the Buy-Rite consultation and quotation service and the $14.00 in credit certificates. The fourth item included in the solicitation package was the membership application form. Listed there among the numerous membership benefits was "an introduction to a unique Factory Buying Plan thru which [the member] can buy over 20,000 items. . . ." in addition to a "tremendous color catalog exceeding 700 pages. . . ." to be used through the Factory Plan.

Sometime after the new Buy-Rite member had parted with his seven dollar membership fee, he again received a letter from Matthew Grady (Fry). This letter stated that under separate cover the member could expect to receive, among other things, introductory literature to a "bona fide Factory Buying Club" and a wholesale catalog of around 700 pages from appellant Standard Distributors, Inc. Shortly, the situation became clear when the member received a letter from appellant Factory Supply Company, explaining that Buy-Rite had requested Factory Supply to forward a copy of its Factory Buying Plan. Because of their Buy-Rite membership, the fee for the Factory Buying

plan was reduced from $18.75 to $13.75. "Why should you join the Factory Buying Club?" the letter asked.

> "As a Buy-Rite member you can buy only about 2,000 items from them at Factory prices. But, as a member of Buy-Rite you have received several catalogs, notably a large 700 page wholesale catalog containing well over 12,000 items.
>
> . . . We supply EVERY item in this large catalog PLUS THOUSANDS MORE! . . .
>
> . . . .
>
> YOU'LL RECEIVE the following additional material:
>
> 1. A comprehensive Master Factory Price Index showing Factory or Importers' quotations on the items in the large 700 page catalog. . . ."

Buy-Rite members thus learned that the 20,000 items at factory or importers' quotations could be purchased only with the "Master Factory Price Index" obtained at the expense of joining another plan for $13.75.

That members were misled by the initial solicitation material was admitted by appellant Press, who testified that Buy-Rite members inquired as to when they would receive the 700 page catalog, "so they could buy the 20,000 items at factory cost," and that "it became evident that some of the people who were reading the literature, didn't fully understand, or weren't reading all of the literature. . . ." Buy-Rite, therefore, distributed the so-called "disclaimer letter" wherein Matthew Grady (Fry) explained:

> "I hope you are wise enough to realize that $7 cannot possibly cover an offering of 20,000 items. In our literature we stated we would introduce you to Factory Buying Club. This Club does sell some 20,000 items at Factory or Importer's quotations. You'll

receive this offer from Factory Supply Company.... We managed to secure a $6 consideration against a membership in this Factory Buying Club in your behalf."

A large part of the Government's proof was devoted to the manner in which Buy-Rite handled orders from members. Those employees in the Bennington office did little more than process orders and correspondence and fend off telephone inquiries by saying that the fictitious "Mr. Grady" and his equally fictitious associates were "in the warehouse" or "on the road" and could not be reached. Replies to complaints of undelivered merchandise were evasive, particularly where refunds were demanded. More than thirty disillusioned Buy-Rite members took the stand and described their persistent efforts to secure refunds of payments and membership fees after having waited months for merchandise that was never delivered. They also told of what the solicitation material had led them to believe Buy-Rite offered. In addition, officers of a Chamber of Commerce organization, the Greater Bennington Association, testified that a large number of complaints had been received by their office and that they had been called to Buy-Rite's attention.

Three witnesses took the stand for the defense. B. D. Venner, a "drop shipper," said that on one occasion he had shipped merchandise to a Buy-Rite customer who had testified for the Government but that Railway Express had lost or misplaced the shipment. While Venner said that he had put a "tracer" on this shipment, he admitted that he had made no attempt to follow it up with Railway Express even though the merchandise was not delivered. David J. Raibert, a Certified Public Accountant and appellants' "business adviser" testified that the four corporations comprised one integrated economic group, and that they were financially responsible. Raibert had conferred fre-

quently over problems with postal authorities and with Dun & Bradstreet. He described generally the sudden growth in business in mid-1961 and said he had arranged for the instaliation of electric IBM equipment to speed customer service.

Appellant Press told of his background in merchandising the growth of his mail order business, the difficulties experienced in obtaining competent help, the engagement of an efficiency expert and of conferences with his lawyer and a Postal Inspector wherein he sought to alleviate Buy-Rite's severe growing pains. Press insisted that his intentions were honest, and his lengthy testimony pictured the good-faith efforts of enterprising businessmen to keep pace with the enormous response which greeted their merchandising plan. Any difficulties encountered by customers, he asserted, were due to careless business methods and inadequate clerical help and did not reflect the existence of a fraudulent scheme.

On this appeal appellants urge numerous points for reversal: 1) the guilt of the defendants was not established beyond a reasonable doubt, that the Government's evidence was entirely circumstantial and did not exclude every hypothesis of innocence; 2) prejudicial hearsay evidence of customer complaints was improperly allowed; 3) various errors in the court's charge; 4) that appellants were victims of local prejudice which was not remedied by the court's charge; 5) that the court erred in allowing the indictment to go to the jury room; and, 6) that appellant Fry was deprived of a fair trial because his original counsel withdrew from representation of Fry but continued as counsel for co-defendants with adverse interests.

Sufficiency of the Evidence

We find no merit whatsoever in appellants' assertion that the evidence was insufficient to support the jury's verdict of guilt. Quite to the contrary, this is not even

one of the "close" cases arising under the Mail Fraud Statute with which we have expressed particular concern lest defendants be at the mercy of embittered purchasers whose hopes for bargains have been thwarted. See, e.g., *United States* v. *Baren,* 305 F. 2d 527, 533 (2d Cir. 1962). A jury has had an opportunity during a long trial to hear many witnesses including the defendant Press and to evaluate their testimony, and by its verdict it has found certain defendants were guilty of fraudulent practices. An appellate court must not attempt to usurp the function of the jury. "[O]n appeal the facts must be considered in a light most favorable to the government," *United States* v. *Tutino,* 269 F. 2d 488, 490 (2d Cir. 1959), and "all permissible inferences which tend to support the judgment" must be drawn. *United States* v. *Kane,* 322 F. 2d 787, 788 (2d Cir. 1963).

It is undisputed that Press and Fry both took part in framing the literature they caused to be sent through the mails. We think this material such that the jury would have been warranted in concluding that it was calculated to deceive. Thus, a prospective Buy-Rite member was led to understand that for $7.00 he would receive an extensive 700 page catalog and that he could make purchases from that catalog at substantial savings. This was not true. Although most members did receive a 700 page catalog, it was at best a hollow offering since they were not entitled to make purchases from this catalog at the savings anticipated. The initial mailing in itself, therefore, was some evidence from which the jury could infer that appellants knowingly engaged in a scheme to defraud by inducing recipients to pay $7.00 for benefits appellants knew not to be included in the offer. More damning, however, were the mailings which followed the initial promotion literature. Appellant Press admitted that some recipients had misunderstood what was to come with club membership. To dispel this confusion, the "disclaimer" letter was

ordered and distributed. The jury might weil have thought that at this point, if appellants were acting in good faith and had only been too enthusiastic in otherwise legitimate sales puffing, they should have made appropriate changes in the promotion material so that others would not be similarly misled. But even after the "disclaimer" was printed, appellants had the solicitation material reprinted in substantially greater volume. And thereafter, the 'disclaimer" letter was again printed and distributed.[1]

In addition to the evidence going to the content of appellants' mailings, the jury might have thought it of some moment that at a time when appellants' office force was drastically understaffed and, on appellants' own theory, inefficient in filling orders and otherwise providing the advertised services, these solicitation materials continued to assert that "most orders are shipped . . . within 24 hours after receipt." It is clear beyond doubt that this was a knowing misstatement of fact, and the jury could well have found further that it was intended to create an expectation of a quality of performance which the appellants knew they could not satisfy. Finally, the manner in which customer complaints were handled might have led the jury to find that appellants planned to outlast dissatisfied members, retaining purchase payments and membership fees without making efforts to carry out the obligations that had been incurred. Cf. *United States* v. *Kyle,* 257 F. 2d 559,

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[1] Postal Inspector McAvoy testified that the Buy-Rite solicitation material was mailed in the following sequence:

March, 1961	25,000
June, 1961	100,000
July, 1961	500,000
August-September, 1961	1,000,000
October-November, 1961	1,000,000
December, 1961	1,000,000

In July, 1961 and again in September, 1961, 25,000 copies of the "disclaimer" letter were printed.

562 (2d Cir. 1958), *cert. denied,* 358 U. S. 937 (1959). There was, in sum, sufficient evidence from which the jury might have found that appellants knowingly and wilfully embarked on a scheme to defraud in the course of which they made representations reasonably calculated to deceive persons of ordinary prudence and comprehension. See *Silverman* v. *United States,* 213 F. 2d 405, 407 (5th Cir.), *cert. denied,* 348 U. S. 828 (1954).

Closely allied with appellants' claim of insufficiency of the evidence is the argument that to convict on circumstantial evidence the direct evidence must exclude every reasonable hypothesis of innocence, and that the direct evidence here overwhelmingly shows appellants' good faith. Appellants submitted a request to charge to this effect which was refused. As we said in *United States* v. *Tutino, supra,* at 490, "this circuit has never held that circumstantial evidence, to be sufficient to convict, must exclude every reasonable hypothesis of innocence to be drawn from the evidence." The Supreme Court, in *Holland* v. *United States,* 348 U. S. 121, 139 (1954) has approved of this view. Here, it was for the jury to say whether or not the evidence supported appellants' defense of good faith.

Evidence of Member Complaints

Appellants urge that the convictions must be reversed because the trial court erroneously admitted the testimony of witnesses Short, Hicks and McAvoy that they had received numerous letters from members expressing dissatisfaction with various facets of the Buy-Rite operation. Since appellants did not have the opportunity to cross-examine the authors of such letters, it is argued, these communications were hearsay and were not competent to establish guilt. Had these complaints been offered to prove Buy-Rite's failure to perform its obligations, this argument would have merit. But statements inadmissible to prove the

truth of what they assert may be admitted if the fact of the assertion is in itself relevant irrespective of its truth. See 6 Wigmore, *Evidence* § 1766 (1940 ed.).

In the early stages of the trial, the Government (over objection) adduced from Short, former executive director of the Greater Bennington Association the fact that the Association had received complaints about Buy-Rite. Short said that he notified defendant Selmajane Stuchell and that she had answered that the correspondence was being taken care of by Buy-Rite. Hicks, Short's successor in office, also was allowed to testify that he had received inquiries and complaints pertaining to Buy-Rite. At least eighty per cent of this correspondence was called to Mrs. Stuchell's attention by way of some twenty weekly communications wherein Hicks had summarized the nature of the complaints and had given the pertinent data so that Buy-Rite might remedy the situation.[2] Hicks said that the majority of complaints claimed that goods had not been received after money had been sent and that membership fees were not returned within the thirty-day period as advertised. Postal Inspector McAvoy testified that he had undertaken an investigation of the affairs of Buy-Rite and that during a visit to the Bennington office, he observed Buy-Rite personnel separate a large number of complaints from the daily mail. These complaints, along with other correspondence, were forwarded to Lodi where it was processed by the two-man "correspondence unit." In answer to a preliminary question, he explained that his investigation was initiated because of the "numerous complaints" concerning appellants' various enterprises that were received by the Post Office Department. A total of 3,40[illegible] communications had been received, he said, of which about one-half pertained to Buy-Rite. On cross-examination, McAvoy was asked if he sent copies of letters he received from cus-

[2] These weekly summaries were received in evidence.

tomers to any officer of Buy-Rite. McAvoy replied in the negative, and on redirect, was asked why he had not done so. He gave three reasons. The first, his own conclusion, that "the defendant corporation had shown a complete lack of good faith," the court ordered stricken. In the second, he summarized a large number of complaints by persons "who had specifically stated that they were not interested . . . in receiving a refund," and added that "they wanted the Post Office Department to conduct an investigation, so that other persons would not be victimized the way they had been." For a third reason he stated that the Post Office Department is not permitted "to act as a collection agency, or to adjust differences that might arise between patrons of the postal service." None of the complaints discussed by Short, Hicks or McAvoy were introduced into evidence.

Of course, evidence that complaints had been received would not have been admissible to show that members had, in fact not received catalogs, merchandise or refunds. But evidence that there had been complaints which were called to appellants' attention was relevant on the issue of appellants' intent and good faith. The inference might readily be drawn that, since appellants knew that members were being misled by solicitation literature and that there was general dissatisfaction with the manner in which Buy-Rite conducted its affairs, continued operation despite this knowledge showed the existence of a scheme to defraud. See *Reistroffer* v. *United States,* 288 F. 2d 379, 388 (8th Cir. 1958), *cert. denied,* 358 U. S. 927 (1959); cf., *United States* v. *Kyle, supra,* at 564; *Harrison* v. *United States,* 200 Fed. 662, 674 (6th Cir. 1912). Viewed in light of the theory on which it was offered, therefore, this evidence was not hearsay, since it was not offered to show the truth of the charges in the complaints. See *Frank* v. *United States,* 220 F. 2d 559, 563-64 (10th Cir. 1955); *Buchanan* v. *United States,* 233 Fed. 257, 259 (8th Cir. 1916); Wigmore, *Evidence* §§1361, 1789 (3d ed. 1940); McCormick, *Evidence*

§225 (1954). Although appellants were entitled to have the complaints offered, they did not object on that ground.

Buy-Rite's efforts to gain members did not cease with the December 1961 solicitation mailing. As late as April 1962 at least one magazine advertisement encouraged readers to send for information explaining Buy-Rite's advantages. And although the last volume solicitation mailing occurred in December 1961, Buy-Rite's responsibility for the representations therein continued in full force. Perhaps continued delays in filling orders or making refunds of payments and membership fees were not anticipated even though numerous complaints in this regard had been received. But certainly, Buy-Rite's personnel knew full well after December, when a great bulk of membership applications and orders poured in and were accepted, that the $7.00 would not bring the right to buy 20,000 items in the 700-page catalog at factory cost. In accepting the membership fee, Buy-Rite reaffirmed the solicitation material's misleading representations to the contrary. There was some evidence that complaints received by Hicks after December 31, 1961, were grounded in the customers' misunderstanding of that portion of the solicitation material, just as much earlier other "complaints" had caused Buy-Rite to compose and print 50,000 "disclaimer" letters. Finally, the indictment charged that part of the scheme to defraud was to ignore letters of inquiry and orders that had been placed.

Of course, the Government could not build its case merely upon evidence of complaints received after the last solicitation mailing. However, the important elements of the fraud were developed quite apart from this evidence. The original representations were proven to have been false by the "Factory Buying Club" letter and the "disclaimer" letters. The some 200 complaints received prior to the end of 1961 were sufficient to put defendants on notice that their representations were being so interpreted as to make them misrepresentations.

Furthermore, the trial court gave charges, requested by appellants, which specifically advised the jury that they were to resolve the question of appellants' good faith "in the light of the circumstances as they appeared at the time that representations were made" and that if appellants believed that they could honestly carry out their promises "You [the jury] should find the defendants not guilty despite the fact that some members may have lost money or had their refunds delayed." To this the court added (as also requested) that "The defendants cannot be held criminally responsible for every delay that occurred."

Reference of witnesses to complaints that were not brought to appellants' attention[3] stand on a different footing. That there were member complaints in substantial volume which *were* called to Buy-Rite's attention was disclosed early in the trial through witness Short and again by Hicks. Appellant Press admitted that inquiries and complaints were received in the normal course and under Fry's counsel's cross-examination McAvoy testified to a set procedure which Buy-Rite had established to cope with complaints. Many of the Buy-Rite members who testified referred to correspondence with Buy-Rite. Moreover, it was apparent that Buy-Rite knew that complaints were in many cases not sent to Buy-Rite in the first instance, and that it was not apprised of each and every one. In a letter to McAvoy, when his investigation had just begun, Buy-Rite's attorney explained: "The arrangement that we presently have with many public and quasi-public organizations, in handling complaints which are received by the agency is that the complaints are forwarded either to this office or directly to the company involved, and the agency is given

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[3] This category includes those complaints (twenty per cent) that Hicks did not call to Buy-Rite's attention; those that Hicks said were still being received at the time of trial at the rate of four per day; and, those that were sent directly to Postal authorities.

carbon copies of letters or other explanations of the way the particular complaint is being handled." The letter goes on to suggest that McAvoy adopt a similar procedure for the Buy-Rite complaints he was receiving.

Because of the prominence of the complaints called to Buy-Rite's attention that were properly in evidence, the fact that there was mention of other complaints not specifically called to Buy-Rite's notice did not constitute error sufficiently prejudicial to demand reversal.

Under the exception concerning declaration of states of mind recognized in *Sugden* v. *St. Leonards,* L. R. 1, P. D. 154, 251 (1876), even such complaints were receivable to show the extent of dissatisfaction; although defendants could have insisted on production of the complaints, they did not do so—doubtless wisely. While this had such small relevancy that it would better have been excluded, appellants countered with the contention that the complaints were a small portion of the total number of customers, and the trial court charged that "the number of complaints, not the complaints themselves, unless they were brought to the attention of Buy-Rite, are only relevant as circumstantial evidence as to whether or not there was in fact a scheme or artifice to defraud." True, the jury may not have understood this as limiting the use of unknown complaints to the exceedingly limited purpose we have indicated. But the number of complaints whose existence was not in some way brought to Buy-Rite's attention was so small in comparison to the number of which it was aware that any error could hardly have been prejudicial. Although the complaints received by the Post Office were not forwarded to Buy-Rite, the letter from Buy-Rite's attorney to McAvoy suggesting procedures for dealing with the flow of complaints addressed to the Post Office shows appellants' awareness of the existence of a large number, if not their precise number and nature.

Another problem is posed by McAvoy's explanation upon redirect examination of why he had not forwarded to Buy-Rite copies of the complaints the postal authorities had received. Since this line of questioning was opened on cross-examination, on redirect the Government was entitled to develop why McAvoy had not done so. Whether or not appellants were acting in good faith was the crucial finding of fact which was in the province of the jury; McAvoy's opinion was totally incompetent. Although his comment that some Buy-Rite members requested a Post Office investigation so that others would not be "victimized the way they had been" may have been opened up by cross-examination, it would better have been stricken. However, when the testimony is considered in its setting we do not think the error was so grievous as to warrant reversing the convictions. The test is whether appellants' rights were substantially prejudiced. Fed. R. Crim. P. 52(a); *Kotteakos* v. *United States,* 328 U. S. 750, 764-65 (1946); *United States* v. *Cianchetti,* 315 F. 2d 584, 590 (2d Cir. 1963); *United States* v. *Sansone,* 206 F. 2d 8€ (2d Cir. 1953).

One of the main considerations in deciding if substantial prejudice exists because of the introduction of hearsay material is the strength of the Government's case independent of the hearsay. See *Delli Paoli* v. *United States,* 352 U. S. 232 (1957); *United States* v. *Cianchetti, supra.* Here, the evidence of guilt was overwhelming. This is certainly not a case where the McAvoy testimony can be considered as the factual straw that tipped the scales against appellants. To the contrary, his conclusory statements in the main reiterated the theory which the Government had urged and had supported with abundant evidence from the beginning of the trial.

Cases which have considered the impact of improperly prejudicial comments in the prosecutor's summation to the jury are closely analogous and provide some guideposts

where, as here, the statements at issue come from a major Government witness. In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239-40 (1940), the Court affirmed a Sherman Act conviction despite the prosecutor's energetic appeal to class prejudice, stating:

> "In the first place, it is hard for us to imagine that the minds of the jurors would be so influenced by such incidental statements during this long trial that they would not appraise the evidence objectively and dispassionately. In the second place, this was not a weak case as was *Berger* v. *United States*, 295 U. S. 78, where this Court held that prejudice to the accused was so highly probable as a result of the prosecutor's improper conduct 'that we are not justified in assuming its nonexistence.' . . . Of course, appeals to passion and prejudice may so poison the minds of jurors even in a strong case that an accused may be deprived of a fair trial. But each case necessarily turns on its own facts. And where, as here, the record convinces us that these statements were minor aberrations in a prolonged trial and not cumulative evidence of a proceeding dominated by passion and prejudice, reversal would not promote the ends of justice."

In *Isaacs* v. *United States*, 301 F. 2d 706 (8th Cir.), *cert. denied*, 371 U. S. 818 (1962), the court described the prosecutor's remarks as being "one, outside the record; two, defamatory and derogatory of defendants and their counsel, and three, personal opinion and belief of guilt of the defendants." In affirming the convictions, the court noted that "the dominating question, always, is whether the argument complained of was so offensive as to deprive the defendant of a fair trial," and "whether in light of all the facts and circumstances . . . the utterances . . . so influenced the jury as to bring about an unjust conviction."

301 F. 2d 736-37. Similar considerations controlled in *United States* v. *Walker*, 190 F. 2d 481 (2d Cir.), *cert. denied*, 342 U. S. 868 (1951); *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 638 (2d Cir.), *cert. denied*, 329 U. S. 742 (1946); *United States* v. *Brown*, 79 F. 2d 321, 324 (2d Cir. 1935).

An evaluation of the McAvoy testimony in the context in which it appears, especially when it is compared with the inflammatory comments which have failed to render other convictions defective, leads to the firm conviction that appellants have not been substantially prejudiced. McAvoy's over-zealous characterizations occurred as a fleeting incident in a trial involving more than fifty witnesses and well over a thousand exhibits. Practically a full calendar month was consumed by the trial, and the transcript extends to just under 2,000 pages. Furthermore, in light of other evidence, it could have come as no real surprise to the jury that Buy-Rite members thought they had been victimized or that their complaints resulted in a Post Office investigation. This conclusion is bolstered by the very nature of the facts that the jury was asked to determine: of critical importance was the illusive intent of appellants and not the existence of complaints or the reactions of Buy-Rite members. As in the *Socony* case, the statements were "minor aberrations" that do not reflect the general tenor of the trial.

Complaints also figure prominently in appellants' claim that the prosecutor used unfair tactics to influence the jury. The government offered in evidence a large box filled with approximately 750 letters, purportedly sent to the Greater Bennington Association by discontented Buy-Rite members. These letters, Hicks noted, were the basis for his weekly communications to Mrs. Stuchell. Ruling on the objection to its admissibility was reserved pending examination of its contents by the court and defense counsel. Because cross-examination of Hicks was postponed, the

carton was in plain view of the jury for a number of trial days. During Hicks' cross-examination, the Government withdrew its offer, whereupon the defense moved for a mistrial.

Apart from all else, a sufficient answer is that the carton's presence on the counsel table had not previously stirred defense counsel to seek corrective action. Nor have appellants shown the prosecutor's conduct in offering the contents of the box to be such that a mistrial should have been granted.

Errors in the Charge

Appellants find reversible error in both the factual and legal phases of the instructions to the jury. Although an examination of the charge reveals some portions which plausibly may be questioned, reviewing the charge as a whole, we find the law to have been fairly and correctly stated and no error in the review of the evidence.

Appellants complain that the trial court unfairly emphasized the Government's case in its review of the evidence. They rely largely on the fact that twenty-three pages of the charge were devoted to the Government's case (including a resume of the counts in the indictment) while the defense was treated in but two and one-half pages. It should be apparent, however, that measurement of volume is of no real help in determining the propriety of the review of the evidence. See, e.g., *United States* v. *Laurelli*, 293 F. 2d 830, 832-33 (3d Cir. 1961), *cert. denied*, 368 U. S. 961 (1962). Were the trial judge bound to lay out for the jury's benefit each nugget of proof and every explanation thought to be helpful in advancing the cause of each defendant, the advantages sought to be derived by the summation would be thoroughly frustrated. See *United States* v. *Pontvena*, 319 F. 2d 916, 940 n. 14 (2d Cir.), *cert. denied*, 375 U. S. 940 (1963). The test is one of fairness and thus

quality and not quantity must be the governing consideration. The substantial imbalance here, for example, naturally resulted from the very nature of the proof: the Government had presented some fifty witnesses compared with the defendants' three. As is not uncommon, moreover, the time devoted to each side went primarily to a review of witnesses rather than of evidence. There has been no claim that the trial judge distorted or misconstrued the evidence, such that the jury could not pass fairly on appellants' factual position. The heart of the defense was their intent —that their activities were carried out in good faith. Necessarily, that portion of the charge covering the law of the good faith defense supplemented the review of the evidence. We are not able to say that the summary of evidence was unfair and that it requires reversal.

The trial court declined to recite a number of principles of law in the charge as requested by appellants, which they deem prejudiced error. We have compared the omitted requests to charge urged on appeal with the instructions actually given and with several exceptions, which we treat elsewhere, find the legal substance of appellants' requests sufficiently covered. "Even though a requested instruction be a correct statement of applicable law, its refusal does not constitute error if the issues in the case have been correctly and adequately covered in the general instructions given." *Bary* v. *United States*, 248 F. 2d 201, 214 (10th Cir. 1957), *cert. denied*, 359 U. S. 934 (1959); see *Agnew* v. *United States*, 165 U. S. 36, 51 (1897).

Local Prejudice

Appellants base their claim that they stood trial in an atmosphere of local prejudice engendered by the prosecution and compounded by the court's failure to charge as requested rests in the main on one incident which occurred while appellant Press was on the stand. On cross-

examination, Press' earlier assertion that Buy-Rite chose its Vermont address to profit from the Vermont fair trade situation was challenged. The Government's theory, documented by the references to Vermont in promotion literature, was that the Vermont location was a poorly disguised attempt to convey the impression of "rural honesty" in furtherance of the fraudulent scheme. This line of inquiry was altogether proper.[4] When studied in context, the comments of the trial court appear clearly to have been made in a lighthearted, jocular vein. Evidently defense counsel added to the banter.[5] We are quite clear that this brief episode does not have the importance assigned by appellants. The comments alluded to in no way disparaged the defense or defense counsel, and did not evidence partiality towards either side. See *United States* v. *Ross*, 321 F. 2d 61, 66 n. 3 (2d Cir.), *cert. denied*, 375 U. S. 894 (1963); *Goldstein* v. *United States*, 63 F. 2d 609, 613 (8th Cir. 1933); cf., *United States* v. *Persico*, 305 F. 2d 534, 540 (2d Cir. 1962); *United States* v. *Ah Kee Eng*, 241 F. 2d 157, 161 (2d Cir. 1957).

Since the dialogue was in itself innocuous, we do not find reversible error in the refusal to charge as requested that the "verdict should be one based on the facts and not on bias or prejudice or revenge or sympathy and the fact that

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[4] It follows that the Government's comments in summation going to this issue were within the confines of permissible argument, which includes the right to argue inferences based on the record. See *United States* v. *De Fillo*, 275 F. 2d 835, 840 (2d Cir. 1958). It is not apparent how New Jersey citizens could be unduly prejudiced when the Government's summation urges the jury to protect "American citizens like ourselves from such schemes."

[5] Appellants argue that the prejudicial impact of this incident is conclusively demonstrated by the verdict of not guilty as to the two Vermont residents, Selmajane and William Stuchell. This overlooks the testimony of Press which placed both Stuchells in purely ministerial capacities. Apparently neither joined in managerial decisions or responsibility.

the defendants or some of them are not residents of the State of Vermont, must play no part in your deliberations." We are constrained to comment, however, that it is indeed difficult to fathom why such a request was refused.

Use of the Indictment at Trial

The trial court read the indictment to the jury on three separate occasions: before the jury was impaneled, after the jury was sworn and in the course of the charge. Appellants contend that such repetition erroneously overemphasized the Government's case against them and that reversible error resulted when the jury was given the indictment to take to the jury room.

It is not improper for the court to read the indictment in its entirety or portions thereof to the jury. See *United States* v. *Martin*, 223 F. 2d 666, 667 (2d Cir. 1955). Indeed, in protracted cases involving numerous counts such as this one, reference to the indictment often serves as a helpful guide in delineating the issues the jury may be called on to decide. Similarly, it is not error to give the indictment to the jury for use during its deliberations. See *Twitchell* v. *United States*, 313 F. 2d 425, 431 (9th Cir. 1963), *cert. denied*, 376 U. S. 916 (1964); *Shayne* v. *United States*, 255 F. 2d 739, 743 (9th Cir.), *cert. denied*, 358 U. S. 823 (1958); *Garner* v. *United States*, 244 F. 2d 575 (6th Cir.), *cert. denied*, 355 U. S. 832 (1957). The decision to do so rests in the sound discretion of the court. *Shayne* v. *United States, supra; C. I. T. Corp.* v. *United States*, 150 F. 2d 85, 91 (9th Cir. 1945). Nevertheless, courts justifiably have been concerned that overemphasis of the indictment may lead the jury to construe the indictment as evidence of guilt of the accused. Therefore, the limiting instructions of the trial court are of particular importance. See *Garner* v. *United States, supra; United States* v. *Schanerman*, 150 F. 2d 941, 945 (3d Cir. 1945).

Appendix A.

Examination of the record in the instant case reveals that whenever the trial court read from the indictment, thorough cautionary instructions were given. Before reading the indictment to the veniremen, the court said:

> "Now the mere fact that there has been an indictment handed down by a Grand Jury is no evidence at all, in any way, of any guilt, on the part of any of the named defendants. It is just a part of the mechanics, set up by the United States Government, for bringing people to trial for alleged offenses. The mere fact that there has been an indictment isn't any evidence of guilt of any kind."

When the jury had been impaneled abbreviated comments to the same effect were repeated. Finally, at the very outset of the charge, the court elaborated on the function of the Grand Jury and reiterated that "the indictment is no evidence of guilt." The use of the indictment here was in all respects proper and appellants' rights were in no way jeopardized.

Withdrawal of Fry's Counsel

Appellant Fry contends that he did not have a fair trial because co-defendants with possible adverse interests were represented at trial by the attorney who had represented Fry upon arraignment (July 24, 1962). On December 17, 1962 this attorney moved *ex parte* to withdraw as counsel for Selmajane and William Stuchell and appellant Fry since he was "of the opinion that some of the defendants, because of their positions towards the charges and towards each other, should have separate counsel." The motion was granted December 17, 1962, well in advance of trial, by an order which stated "that there is a real possibility of a conflict of interest" and directed the attorney to notify those

defendants of his withdrawal. The trial court's decision on the motion to withdraw properly applied the principles recognized in *Glasser* v. *United States,* 315 U. S. 60 (1942). Fry suggests obliquely that he did not testify in his own behalf because of the prospect of cross-examination by former counsel then representing adverse interests. However, he makes no complaint of the caliber of his representation, which was by counsel of his own choice. No objection was made to the Attorney's withdrawal either before or during trial. Furthermore, the defenses of Press and Fry, namely, good faith and honest intentions, were complementary.

Appellant's transparent attempt to profit by the unsolicited precautions taken on his behalf by the trial court and his original counsel, in which he acquiesced, is without merit. His claim of reversible error falls well short of the mark of showing that he was not given a fair trial.

Judgments affirmed.

DIMOCK, *District Judge* (dissenting):

Defendants were convicted on 24 counts charging violation of Section 1341 of Title 18 U. S. Code, the well known mail fraud statute, and on one count of conspiracy to violate it. Simply stated, the crime consists of the use of the mails in the course of a scheme to defraud. Essential to the establishment of the existence of a scheme is proof of the making of false representations of material facts and second, a state of mind of the maker at the time the representations were made consisting either of knowledge that the representations were false or a reckless disregard for their truth or falsity. With the addition of evidence of an agreement, the same proof would suffice for the conspiracy charge.

Appendix A.

There was no dispute as to the alleged use of mails consisting of the receipt of 24 pieces. These contained checks sent by 24 customers of defendant's mail order business.

The alleged representations, insofar as they were of substance, were: first, that, upon the payment of $7, defendants would furnish, among other items, a catalog of some 700 pages and that some 20,000 items could be purchased therefrom at "factory" prices and, second, that delivery of goods ordered and refunds to customers who chose to rescind their "memberships" would be made promptly. These statements were, of course, promissory in nature so that, standing alone, they did not qualify as statements of fact. To substantiate a charge of fraud it was necessary to imply a statement that defendants intended to carry out the promises and then prove that defendants did not in fact so intend.

With respect to the first, it was shown that, only upon payment of an added $13.75, could the 700 page catalog and the right to purchase the added 20,000 items be obtained. Defendants maintained that their promissory representations were not to the contrary.

With respect to the representation of prompt service, the prosecution offered evidence that, in a number of cases, merchandise or refunds arrived belatedly if at all. Defendants contended that poor service was merely the result of an unanticipated flood of customers. The issue, therefore, was whether defendants, at the time when the promise of good service was made, had known that such would not be forthcoming or perhaps had not even intended that it should be.

To prove the second element both of the alleged substantive crimes and of the conspiracy, i.e. that this state of mind had existed, the prosecution introduced a mass of evidence pertaining to over four thousand so-called "complaints." I shall continue to refer to such items by the word which has been universally, though to my mind un-

justifiably, applied to them during the trial and in the majority opinion.

The complainers were not produced. A postal inspector and two representatives of a chamber of commerce testified to complaints that had been received and a box full of complaints was offered and, when objected to as hearsay, left on the counsel table all during the trial pending a final withdrawal of the offer.

The only evidence as to the contents of these complaints as to which the postal inspector and the representatives of the chamber of commerce testified was that they contained statements that deliveries and refunds to the writers had not yet been received. I find no evidence that any of them were grounded upon misunderstanding of the promotion material's statements as to the 20,000 factory cost items.

Defendant Buy-Rite had 50,000 members. Up to December 31, 1961, complaints, presumably all dealing with non-receipt of deliveries or refunds, and numbering not more than 200, had been called to defendants' attention by the chamber of commerce which had received them over the nine month period beginning in April 1961. Defendants did not thereafter send out any more of the material containing the representations complained of. There is no evidence that any advertisements published later reiterated these representations.

In spite of the cessation of mailings at the end of 1961, a chamber of commerce executive was permitted to testify to his subsequent sending of complaints to the defendants. During the charge the trial court read to the jury a list recounting the weekly totals of communicated complaints totaling, for the period between February 27, 1962 and June 23, 1962, some 225. A postal inspector testified that he saw 242 complaints at defendants' office in Bennington, Vermont, on January 12, 1962 and 251 at defendants' office in Lodi, New Jersey, on January 30, 1962. He testified that 1600 complaints had been received by the Post Office De-

partment relative to defendant Buy-Rite and 1600 in relation to its affiliate, defendant Factory Supply Company. He did not furnish these 3200 items to the defendants or, so far as the record discloses, notify defendants of their contents, or even their existence. The foregoing applies with equal force to 625 complaints which the chamber of commerce executive said that he had received over and above the 225 referred to in the charge.

Thus, of the 4000 odd complaints testified to, not more than 200 were called to defendants' attention before they stopped making representations, some 700 more were called to their attention thereafter and the remainder, the overwhelming majority, were never called to their attention.

As evidence of the truth of their contents, these complaints were all clearly hearsay. The majority opinion says, however, that the inference might be drawn that continued operation despite knowledge of complaints showed the existence of a scheme to defraud.

This may possibly be true with respect to the 200 complaints received by the chamber of commerce over a 30 to 40 week period and called to the defendants' attention from time to time during the period of mailing of promotional material. It may be that notice to defendants, from whatever source and however unreliable, that there were delays in their operations, coupled with subsequent repetition of a promise that operations would be prompt, would be admissible to suggest the existence of a reckless state of mind in the defendants at the time of the repetition of the promise. It may also be that there is a permissible inference that this reckless state of mind not only persisted into the indefinite future but existed in the indefinite past so as to meet the requirement of scienter or recklessness at the time of the earlier making of the representations. The whole of this rather flimsy structure is founded, however, on the fact that the defendants reiterated the representations

after notice that they had not been acting promptly. This theory, of course, would justify the admission of only the less than 200 complaints brought to defendants' attention in 1961 before the last reiteration of the representations.*

There is not even this basis for the admission of evidence of notice, given to defendants in 1962 after their last reiteration of the representations, by the receipt of 242 complaints in defendants' office in Bennington, 251 complaints in Lodi and 225 complaints received by the chamber of commerce executive and sent to defendants.

The majority, however, hold that, in accepting membership fees after December 31, 1961, defendants reaffirmed what are referred to as the solicitation material's misleading representations that $7.00 would bring the right to buy 20,000 items at factory cost. This theory necessarily proceeds upon the assumption that defendants were under a duty not to accept the membership fees. Such a duty could only arise if defendants had notice that the applicants had been misled. Though one of the defendants admitted that "some of the people who were reading the literature, didn't fully understand, or weren't reading all of the literature and were writing in and asking when they would receive the 700 page catalogue, so they could buy the 20,000 items at factory cost," nothing had occurred which would oblige defendants to presume that every recipient of the promotional material had been misled into thinking that the "introduction" to the Factory Buying Plan would permit the recipient to take advantage of it without further cost. The promotional material was at worst only equivocal on that point. The fact that a representation is capable of misleading is not enough. The recipient must be misled. The sending in of $7.00 membership fees by prospects was not evidence to defendants that the senders

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* An advertisement published in April 1962 did not embody a reiteration of the representations.

had been misled. The admission of evidence of the approximately 700 complaints of which defendants received notice after the cessation of mailings of promotional material was therefore erroneous.

Neither the court below nor the majority of this court have stopped at approving the admission of evidence of complaints brought to the attention of defendants. Evidence of 3825 complaints of which defendants never heard was admitted below, and its admission was specifically submitted to the jury by the charge and the substance of the charge submitting it approved by the majority.

At this point the majority opinion no longer ostensibly applies settled principles of law to the facts of the particular case but creates a new principle. The court holds that, in a fraud case, evidence of the extent of dissatisfaction of third persons, not proved to have been defrauded, is admissible. The Government concedes that the issue appears to be one of first impression. The courts went far in holding that, in a fraud case, evidence of other frauds committed by the defendant was admissible. I think that the majority go too far in opening the door still farther and admitting evidence of mere dissatisfaction of others with whom the defendant has done business.

It is a rare large business organization which, no matter how high its ethics, does not find it necessary to maintain a complaint department to deal with dissatisfied customers. No one would claim that the existence of a dissatisfied customer whose dissatisfaction was not based on fraud would have any logical bearing on the question whether a defendant had been guilty of fraud in another case. Yet the rule of the majority opinion admits, as proof of fraud, evidence of dissatisfaction without any proof that the dissatisfied customer was defrauded.

My brethren have introduced a new darling to the prosecutor.

Appendix A.

The errors in the admission of evidence of complaints and of dissatisfaction and the error in the charge cannot be disregarded as not of critical importance. The inadmissible evidence of complaints and dissatisfaction may well have been the deciding factor. What was presented was a picture of a rather shabby concern which employed such devices as false names, a $7.00 fee that entitled the customer to pay $13.75 more for more discount privileges, a country address for a metropolitan enterprise, and a special reference to Dun and Bradstreet—not admirable devices but arguably within the morals of the market place. The Government's burden was to demonstrate, in addition, a fraudulent intent. The jury could well have said, "The comparatively few instances where the prosecution presented dissatisfied customers as witnesses may all have been the result of innocent mistakes or carelessness or chance but when they add thousands more we have to rule out mistakes and carelessness and chance; the defendants must have intended to defraud people."

The judgments of conviction appealed from should be reversed and a new trial ordered.

APPENDIX B—Order of Circuit Court on Petition for Rehearing and Stay of Mandate.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

AGAINST

ISIDORE PRESS, alias JOHN GRADY, T. C. FRY, JR., alias MATTHEW GRADY, BUY RITE BUYERS CLUB, INC., FACTORY SUPPLY CO., INC., STANDARD DISTRIBUTORS, INC., and AMERICAN WHOLESALERS, INC.,

Defendants-Appellants.

Before: MOORE and FRIENDLY, U. S. C. JJ., and DIMOCK, U. S. D. J.

PETITION OF T. C. FRY, JR. FOR REHEARING AND STAY OF THE MANDATE

Petition for rehearing denied.

Petition for stay of the mandate granted, subject to Rule 28(c) of this Court.

LPM

HJF

U. S. C. JJ.

EJD

U. S. D J.

October 21, 1964.

APPENDIX C—Constitutional Provisions.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI

JURY TRIAL FOR CRIMES AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

APPENDIX D—Statutes and Rules.

U. S. Code Annotated, Title 18 Federal Rules of Criminal Procedure, Rule 44, Assignment of Counsel

If the defendant appears in court without counsel the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.

(This rule is a restatement of existing law regarding defendant's constitutional right of counsel as defined in Sixth Amendment).

Section 371. Title 18, United States Code

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000, or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment provided for such misdemeanor.

Section 1341. Title 18, United States Code

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such scheme

or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or taken or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

APPENDIX E—Extracts From Stenographer's Minutes.

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(93) Mr. Ryan: The respondents, I think in this motion, I am speaking for all the respondents named in the indictment at this time, based upon the opening statement of the Government, moves for a mistrial on the grounds that the Government has shown bad faith in certain statements made in the opening statement. He has made assertions which are not incorporated into the indictment. One, he instead, attempts to show that 50% of the membership of the Buy-Rite Buyers Club Inc., when they received a disclaimer letter, became so disgusted they they did nothing further about it. Thus, namely the respondents Press and Fry to retain those funds that were paid for the memberships and that this was a part of the initial scheme. There is nothing in the indictment, which means any such artifice or any such plan or any such facts as is claimed and they attempt to prove. Secondly, they have stated that they would attempt to prove and show that there was 3,000 complaints made to the Post Office Department. We think that (94) this again is bad faith in that the indictment alleges no such fact, and to make these statements in an opening statement to the jury, we say, shows bad faith, and puts the burden upon these respondents which they cannot at this time meet.

• • • • • • •

I. Press—Cross—(Radigan):

(1545) Q. Now, Mr. Press, you have testified that you tried to be honest and sincere, isn't that correct? A. That's right.

Q. Would you say it was strictly honest to receive and accept orders for merchandise at less than fair-trade price in Vermont, because it has no fair trade laws, and then turn around and ship the merchandise out of a State that does have fair-trade laws? A. Certainly is.

Q. Such as New York and New Jersey? A. It certainly is honest.

Q. You consider that as being honest? A. A hundred percent.

Q. Mr. Press, why did you mail all of the Buy-Rite parcels, containing orders that you ship yourself, as well as all replies to letters of inquiry, from members, from New York City? A. Well, I believe I told you at some time yesterday, that our main purpose was to keep from manufacturers and sources of supply, the fact that we also owned and operated Buy-Rite Buyers Club. This is the reason that we sent merchandise or mail to New York to be mailed from,—because New York is a mailing center for many houses, including magazines, or, other merchandise.

Q. Wasn't that a type of deception, Mr. Press? A. Deception?

* * * * * *

Government's Opening Argument (Radigan):

(1603) Now, ladies and gentlemen, we suggest to you, that the Vermont address is used only to convey the impression that the business is conducted in a background of rural honesty.

* * * * * *

(1610) In other words, and this was testified to by Mr. McAvoy, there were more than three complaints to every four orders received.

* * * * * *

(1626) You heard Mr. Isidore Press testify about Sanford Drug. He told you that this was a trade name of Buy-Rite and that Mrs. Stuchel was in complete charge of the Sanford Drug account.

We submit to you ladies and gentlemen, that Mrs. Stuchel must have known the ratio of complaints to orders, which Mr. McAvoy testified to. And, I repeat, three complaints to every four orders.

Appendix E.

We submit once again, ladies and gentlemen, just as in the case of Larry Press, that Mrs. Stuchel was an aider and an abettor at the very least, fully aware of the Buy-Rite operation and an essential to that operation's success.

• • • • • •

Argument (Carnahan):

(1817) I ask you what was the purpose in all of this? What was the purpose of, in coming to Vermont? What was the purpose in setting up the Vermont front for a Buy-Rite Buyers' Club, and I think that you will have a different answer from what the defendants suggest here, as to what was involved.

• • • • • •

(1818) These defendants were experienced in the field. They came—they claim so themselves, they had been in it for some years. Consider how starting this new club, this Buy-Rite Buyers' Club in Bennington, Vermont, fitted in with what they were already doing, and I think that you will conclude with us, that doing so, was in fact, a scheme, a very clever scheme that paid, or that made far better use I must say of the name Vermont and that it was indeed a scheme and artifice to defraud lots and lots of people.

• • • • • •

Argument (Carnahan):

(1822) Now, one of the defense counsel has gone to great pains to point out to you that the defense has no duty to put in any evidence. That is correct, under the law, but after sitting here three or four weeks and listening to the tales of troubles and woe and misconceptions and deceits, that some of these some thirty victims were having, with this mail order racket, of the stories about how these people were getting gypped and failed to receive that which they

thought they were promised, after sitting here and listening to all of this evidence, isn't it fair to assume that they might have brought in a few happy and satisfied customers?

Mr. Haugh: Object to the argument of counsel.

The Court: In view of the argument of the defense, we will allow it to stand.

Mr. Haugh: There is no obligation on any of the defendants to present any satisfied customers.

The Court: We will allow it to stand.

Mr. Haugh: Move that it be stricken.

Mr. Carnahan: Well, we have heard a lot of talk and heard a lot of evidence about merchandise going out, where were all of these happy, satisfied customers?

Mr. Haugh: Excuse me but for the sake of the record, we are, we would like to say, as far as we are concerned, we think the record bears us out, those happy customers would be inadmissible.

The Court: In view of the argument of some of the defense counsel, I think this is proper rebuttal.

Mr. Haugh: Note our objections?

Mr. Davis: May we have our objections noted, too? We feel that had we done it, it would be inadmissible.

* * * * * *

(1824) The Court: I say, because of some of the arguments of some of the defense counsel, he is answering it. This objection applies to all defendants and we will note your objections.

Mr. Carnahan: Well, to go on, let me say this, that the defense is certainly, they have certainly said to us that the Government scoured the country to glean the testimony of only thirty or so victims. I heard that myself. I know you have heard it; they used the expression "scoured" two or three times.

These victims told you of how, as a result of the absolute frustration at not being able to get any satisfaction from their correspondence with these defendants, that they, as a last resort, communicated with the Post Office Department. And, we have the testimony which suggests that many, many more, did exactly the same thing.

It was these victims whose testimony you heard at the trial. But, can it be said, that we "Scoured the country," to receive unsolicited correspondence to the Post Office Department from three thousand, two hundred members who had been defrauded by these dependents?

Mr. Haugh: Object to it.

Mr. Leary: Object, if the Court please.

The Court: Perhaps we'll strike out "who had been defrauded," because the evidence is in what the complaint was.

Mr. Haugh: Also, as I understand it, the complaints and letters of inquiry were, there was no breakdown as to which was which.

The Court: We'll strike out from the argument the words "defrauded."

Mr. Carnahan: All right, sir.

(1825) Mr. Leary: If the Court please, we respectfully submit the figure thirty-two hundred should be stricken, too.

The Court: No, there is evidence of thirty-two hundred complaints.

Mr. Leary: Inquiries.

The Court: Well, all right. I think he said "complaints," but the jury will remember what the evidence was as to that and be guided by it.

Mr. Carnahan: That's correct, and certainly, it is your memory of the evidence which counts, and not mine. But, I would ask this further question, and this, I think I am putting to the defense. Would they have us put on the (1826) thirty-two hundred people about whom we are re-

ferring here? Would they have us put on two thousand, a thousand, five hundred? Don't you think the point is pretty clear from the thirty victims witnesses whom we had here in the court room? I must say, I do.

Mr. Haugh: We object to the characterization and conclusions of Mr. Carnahan. It is for this Jury to say, not Mr. Carnahan's conclusions that matter.

The Court: Well, you had your own conclusions, or, counsel did. We think what is fair for one, is fair for the other. The argument may stand.

Mr. Carnahan: And I say, again, did we "scour" the country to cause the Greater Bennington Association to be in receipt of hundreds of letters, some seven hundred, I think the testimony was, altogether. So many letters that they came to the point where they were forced to compile a list of the persons who were complaining each week or so and send it over to the Buy-Rite office. And, by the way, I wonder what ever happened to those complaints?

* * * * * *

(1543) Q. Now, isn't it a fact that Vermont has been blessed with a reputation for rural honesty?

Mr. Ryan: We object, we object, if the Court Please.

* * * * * *

A. Would you please read me the question?

(1544) Reporter: "Q. Now, isn't it a fact that Vermont has been blessed with a reputation for rural honesty?"

A. I would assume so.

Q. You had knowledge of it, didn't you? A. Knowledge of it in,—I don't—I don't understand your question. What do you mean by "knowledge of it"?

Q. Well, this—

The Court: He wants to know if you knew that Vermont has a reputation for honesty when this organization, Buy-Rite, was created. Is that what you want to know?

Mr. Radigan: That's correct, Your Honor.

• • • • • •

APPENDIX F—Motion to Withdraw as Counsel and Order.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

CRIMINAL ACTION No. 6346

THE UNITED STATES OF AMERICA

vs.

ISIDORE PRESS, *et al.*

Now comes Charles F. Ryan whose appearance has heretofore been entered for the respondents in the above entitled action, and states that as he gets into the preparation for trial of this case, he is of the opinion that some of the defendants, because of their positions towards the charges and towards one another, should have separate counsel and he, therefore, moves the Court to allow him to withdraw as counsel for Selmajane Stuchel, William H. Stuchel and T. C. Fry, Jr., alias Matthew Grady.

Dated at the City of Rutland in the County of Rutland and State of Vermont, this 17th day of December, A. D. 1962.

CHARLES F. RYAN

Appendix F—Motion to Withdraw as Counsel and Order.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

CRIMINAL ACTION No. 6346

THE UNITED STATES OF AMERICA

vs.

ISIDORE PRESS, *et al.*

Attorney Charles F. Ryan has filed a Motion to Withdraw as Counsel for all defendants in above case except Isidore Press and the Corporations, and upon representation made by said Attorney Ryan, the Court finds that there is a real possibility of a conflict of interest between the other defendants and those of Isidore Press and the Corporations.

Therefore, it is hereby Ordered that said Charles F. Ryan is permitted to resign as Counsel for Defendants T. C. Fry, Jr., Selmajane Stuchel, William H. Stuchel and Larry Press. Attorney Ryan is instructed to notify defendants that he has had to resign as Counsel and has been permitted to do so by the Court and also to notify them that the Court has Ordered that they secure other counsel immediately and that the case will be reset for trial at Burlington, Vermont, February 12, 1963.

ERNEST W. GIBSON,
United States District Judge.

Rutland, Vermont
December 19, 1962
A. A. Murray, Clerk

Certificate of Service.

I hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have this day mailed a copy of the foregoing petition to Joseph F. Radigan, United States Attorney for the District of Vermont, and Michael P. Epstein, Attorney of the Department of Justice, Washington 25, D. C., and upon the Solicitor General, Department of Justice, Washington 25, D. C., with sufficient postage to deliver said copies this 16th day of November, 1964.

BERNARD BURLAKOFF

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 711

T. C. FRY, JR., ALIAS MATTHEW BRADY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A pp. 11–42; III 49–80) [1] is reported at 336 F. 2d 1003.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1964 (III 81). A petition for rehearing was denied on October 21, 1964 (Pet. App. B. p. 43). The petition for a writ of certiorari was filed on November 20, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Citations are to the certified record filed in the companion case No. 607, This Term. "I" refers to defendant Press's appendix filed below. "II" refers to petitioner Fry's appendix filed below. "III" refers to the government's appendix filed below, supplemented by the proceedings in the court of appeals.

QUESTIONS PRESENTED

1. Whether testimony that numerous complaints were received from victims was properly admissible as background evidence and to show petitioner's knowledge and intent.

2. Whether the government properly questioned the motives for conducting the activities in question from an office in Vermont, rather than from New Jersey where the business had its headquarters and where its warehouse was located.

3. Whether, prior to trial, the counsel for all defendants was properly allowed to withdraw as counsel for petitioner in order to avoid a possible conflict of interest among the defendants.

STATEMENT

Petitioner Fry was a co-defendant of Press, petitioner in No. 607, This Term, and raises the same issues as are presented in No. 607 with one addition. Save for that additional issue, we rely upon our brief in opposition in No. 607.

At arraignment on July 24, 1962, Charles F. Ryan, in open court, entered the appearance of his firm for the defendant (II 1). On December 17, 1962, Mr. Ryan asked leave to withdraw as counsel for petitioner, being of the opinion that some of the defendants, including petitioner, "should have separate counsel" (Pet. App. F. p. 54, II 3). On December 19, 1962, the trial court, finding that there was "a real possibility of a conflict," entered an order allowing counsel to withdraw as to petitioner and others. The court also instructed counsel to tell petitioner to

secure other counsel. It reset the case for trial on February 12, 1963 (Pet. App. F. p. 55; II 5). At trial petitioner was represented by his own counsel. The petitioner points to no instance in the record, and we find none, where he either objected to this procedure or intimated that it caused any problem.

ARGUMENT

The trial judge properly applied the principles of *Glasser* v. *United States,* 315 U.S. 60. There was no reason for the judge to hold a hearing when counsel made his motion to withdraw as counsel for petitioner.' After petitioner obtained his own attorney well in advance of trial, there was no suggestion that former counsel's continued representation of Press would be unfair to petitioner. The present suggestion that petitioner "faced with cross examination by his former counsel did not testify" is an unsupported afterthought. As noted by the court below—"the defenses of Press and Fry, namely, good faith and honest intentions, were complementary" (III 74).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys.

DECEMBER 1964.

U.S. GOVERNMENT PRINTING OFFICE 1964

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 711

T. C. FRY, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

ARTHUR J. HILLAND
410 Shoreham Building
Washington, D. C. 20005
Attorney for Petitioner
T. C. Fry, Jr.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 711

T. C. FRY, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of January 18, 1965, denying his Petition For Writ of Certiorari, and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled case, as prayed for in the petition filed November 20, 1964, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The single issue which petitioner requests this Court to review is one which was "available to petitioner although not previously presented" to this Court (Rule 58, Rules of The Supreme Court of the United States); namely, whether the doctrine of harmless error is broad enough to permit an affirmance in a case where all three judges on the court below agreed that only 200 out of the 4,743 complaints testified to by government witnesses had any bearing on the intent with which certain allegedly misleading representations were made. Two of the judges of the court below concluded the error was harmless. The third judge felt the error was so prejudicial as to require a new trial.

In this mail-fraud case, in an effort to prove an intent to defraud, the trial court permitted a postal inspector and Chamber of Commerce employees to testify that they knew of 4,743 complaints from defendants' 50,000 customers.

The court below unanimously concluded the admission in evidence of 4,543 of the complaints was error; two judges of the court below concluded the error was harmless despite their recognition of the inadequacy of the trial court's curative instruction—and one judge felt the error was so prejudicial as to require a new trial. The inadmissible evidence making up the government's case clearly exceeded the permissible limits of harmless error. This case calls for an expression by this court of the limitations on the doctrine of harmless error—a field of judicial interpretation sorely in need of a salutary sign-post erected by this Court..

The case for petitioner is best summed up by the opinion of the dissenting judge below:

> "The errors in the admission of evidence of complaints and dissatisfaction and the error in the charge cannot be disregarded as not of critical importance. The inadmissible evidence of complaints and dissatisfaction may well have been the deciding factor. . . . The Government's burden was to demonstrate fraudulent intent. The jury could well have said, 'The comparatively few instances where the prosecution presented dissatisfied customers as witnesses may all have been the result of innocent mistakes or carelessness or chance, but when they add thousands more we have to rule out mistakes and carelesssness and chance; the defendants must have intended to defraud people.' "

A consideration overlooked by the majority opinion below is that "Numbers are vitally important in trial, especially in criminal matters." *Kotteakos* v. *United States,* 328 U.S. 750, 772. The reasoning of the majority could apparently be applied whatever the volume of inadmissible evidence, and yet, "the line must be drawn somewhere". *Kotteakos* v. *United States, supra,* at page 774.

Nineteen years have gone by, and many a lower court decision construing "harmless error" has been rendered since this Court said:

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is

rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Kotteakos* v. *United States, supra,* at page 765

After nineteen years of judicial travel, charted only by the *Kotteakos* decision, the time has come for this Court once again to address itself to the limitations inherent in the doctrine of harmless error, a consideration in virtually every criminal appeal. This Court should reconsider and grant the petition for certiorari.

CONCLUSION

For the reasons set fourth above, it is respectfully urged that rehearing of the Petition for Certiorari be granted, and that, upon such rehearing, a writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

ARTHUR J. HILLAND
410 Shoreham Building
Washington, D. C. 20005
Attorney for Petitioner
T. C. Fry, Jr.

APPENDIX

RULE 52, FEDERAL RULES OF CRIMINAL PROCEDURE

"Harmless Error and Plain Error.

"(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Certificate of Counsel

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58 of the Rules of this Court.

ARTHUR J. HILLAND